HICOM BHD

v.

BUKIT CAHAYA COUNTRY RESORTS SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[COMPANIES WINDING-UP NO: D5-28-322-2003]
12 OCTOBER 2005

COMPANY LAW: *Winding-up - Danaharta taking over rights and liabilities of chargee - Disposition of property by Danaharta - Rights of Danaharta - Whether disposal was fraudulent - Shortfall still due after disposal - Losses absorbed by Danaharta - First right of redemption by company being wound-up/creditor - Enquiry by creditor - No objection by liquidator - Application under s. 249 of the Companies Act 1965 - Ex parte application - Whether correct procedure - Effect of - Whether beneficial to company being wound up - Oppression - Abuse of process - Intention of party making application - Companies (Winding Up) Rules 1972, rr. 49, 50 and 51 - Pengurusan Danaharta Nasional Berhad Act 1988, s. 57(1)*

CIVIL PROCEDURE: *Parties - Intervention - Of Danaharta to winding-up - Whether rights and liabilities affected - Subject to application under s. 249 of the Companies Act 1965 - Rules of the High Court 1980, O. 15 r. 6(2)(b)(ii)*

Bank Utama (Malaysia) Bhd ("BUMB") granted a Bridging Term Loan and an Overdraft Facility totaling RM101 million ("said facilities") to the respondent. As security for the said facilities, a first and second fixed charge over land held under Lot 8111,PN 7336, Mukim Bukit Raja, Daerah Petaling Jaya, Selangor Darul Ehsan ("subject land") was granted by the respondent in favour of BUMB. *Vide* a vesting certificate pursuant to the Pengurusan Danaharta Nasional Bhd Act 1988 ("Danaharta Act"), all the rights, title and interest of BUMB in and with respect to the said facilities and the security documents in relation thereto, were vested in Danaharta and the respondent was duly notified. Subsequently the respondent was wound-up and liquidators were appointed ("liquidators"). Danaharta issued the respondent a letter of demand for payment of all sums due under the said facility and when the respondent defaulted in repayment thereof, Danaharta issued a notice to sell the subject land by way of private treaty to the respondent pursuant to the Danaharta Act. After the respondent was wound up, P & N Construction Sdn Bhd ("creditor") through its holding company Nam Fatt Corporation Bhd wrote to

Danaharta indicating an interest to purchase the subject land at RM150 million wherein at the material time, the subject land was valued at RM110 million. The creditor then lodged a private caveat over the subject land. Danaharta then lodged its proof of debt of the respondent and pursuant to its rights as chargee disposed off the subject land by way of private treaty to SJ Properties Sdn Bhd ("SJ Properties") for RM135 million. After the said sale, the creditor wrote and informed the liquidators that they wished to purchase the subject land and this was duly communicated by the liquidators to Danaharta. SJ Properties as new owners of the subject land filed an originating summons in court for the removal of the creditor's private caveat which was duly allowed by the court. The creditor then wrote to the liquidators requesting information on the dealings surrounding the disposal of the subject land by Danaharta and subsequently filed an *ex parte* summons-in-chambers (encl. 24) for an order to examine the applicant on the dealings with the subject land. After the filing of encl. 24, Danaharta wrote to inform the liquidators that they were unable to accommodate the request of the creditors to purchase the subject land as it had already been sold to SJ Properties and rebutted the liquidators' suggestion that the subject land had been sold without the respondent being first offered a chance to redeem it. After taking into account the proceeds of sale of the subject land, the respondent was still indebted to Danaharta for the shortfall. Encl. 24 was allowed by the court ("*ex parte* order"). Danaharta and the applicant then filed in encl. 33 and encl. 35 to set aside the said *ex parte* order.

The issues that arose before this court were:

i) Whether Danaharta had the right to intervene in these proceedings;

ii) Whether an *ex parte* order could be granted to the creditor pursuant to s. 249 of the Companies Act 1965 ("s. 249") and the principles governing applications made thereunder;

iii) Whether an examination under s. 249 must be for the benefit of the respondent; and

iv) Whether an examination under s. 249 had an oppressive effect.

Held (allowing Danaharta's and the applicant's application *vide* encls. 33 and 35 with costs and setting aside the *ex parte* order):

[1] Danaharta's right to intervene in these proceedings cannot be disputed as its officer, the applicant, is being summoned to court to be examined by the creditor and its documents are the ones being required to be tendered

to court pursuant to the said *ex parte* order. The transaction in question is the sale of the subject land by Danaharta to SJ Properties and its rights and liabilities in respect of the subject matter of the proceedings may directly be affected by the order or any subsequent order the court makes. In the present situation, the court is fully satisfied that the rights and interest of Danaharta will be directly affected in the proceedings and on those considerations, the court allows Danaharta's application for the applicant to intervene and be joined as a party in these proceedings. (pp. 203 h & 204 a, d)

[2] Reading both s. 249 together with r. 49 of the Companies (Winding Up) Rules 1972 ("r. 49"), it clearly shows that only the liquidator is entitled to apply *ex parte* under those provisions. The creditor or contributory may apply for such an order but it must be by way of *inter partes* summons. The finding that the creditor's application cannot be made *ex parte* is fortified when r. 49 is read together with rr. 50 and 51 of the same Rules where distinctions are made as to when a creditor is expressly entitled to make an *ex parte* application. Rule 49 clearly provides that only a liquidator can make an *ex parte* application under s. 249. If a creditor wishes to make a s. 249 application, it must be by way of *inter partes* summons and the necessary papers must be served on the liquidators as well as other persons who may be affected by the order applied for. In the present case, the creditor has failed to comply with the proper procedure in obtaining the *ex parte* order. Therefore the court is satisfied that the said *ex parte* order should not have been granted and therefore must be set aside. Even if the liquidators did not object to the creditor's application, that does not mean that the creditor can be exempted from the procedural requirement as laid down by r. 49. (pp. 205 f-h & 206 a-e)

[3] Our legal proceedings are generally required to be conducted in the manner of an adversarial contest and the process of taking information or evidence on oath pursuant to these provisions is an aberration which has been allowed into the fundamental tenet of an adversarial system. The court therefore plays an important and critical role in policing the exercise of these powers. In instances where there is neither a reasonable basis for an investigation nor any real prospect of recouping losses or sustaining claims for the benefit of the wound up company, the court ought to be extremely cautious in allowing a proposed examination to proceed. The threshold test for information or documents is not one of "absolute need" but that of a "reasonable requirement". The court must place on the scale of evaluation the purpose and intent of the application on the one hand and the oppression, inconvenience and disadvantage it may visit upon the

proposed examinee on the other hand. In some instances, responses to the queries raised on oath or by way of affidavit may be amply sufficient in place of oral examination. If such relevant information can be procured without the exercise of this coercive power, it should not be invoked. (pp. 208 a-c & 209 b)

[4] In the present case, the court realises that there is no right for the creditor to obtain an *ex parte* order under s. 249. The court must consider balancing the draconian right to invoke the power to examine the applicant against the need to protect him and Danaharta from oppression and abuse of process. The need to protect a third party, in this case Danaharta, as represented by the applicant, is particularly acute as the third party unlike the officers of the respondent, owes no duty to the company. The court has to particularly guard against the use of such oppressive power to order an examination (more oppressive if granted *ex parte)* if the purpose behind it is not for the benefit of the winding up of the respondent but for discovery or fishing of the matters which would be used for the creditor's benefit. (p. 209 c-e)

[5] An examination under s. 249 must be for a purpose beneficial to the winding up of the respondent and must not be used for any other collateral purpose that affords no benefit to the respondent. The court would have to be astute to ensure that the process is not used for improper third party's collateral interests or the personal considerations of the creditor. For the court to order an examination under s. 249, it is necessary to see that there is something that warrants being enquired into. In the present case, the creditor has failed to show how the information sought by the creditor relating to the dealings with the subject land is reasonably required or assists the interest of the respondent in liquidation. It is not disputed that Danaharta as the only chargee of the subject land sold it at a price higher that its market value and that after setting off the proceeds of the sale, a balance was still owing to them. Even if the subject land had been sold to the creditor, a balance would still be owing to Danaharta and there would not be any surplus sale proceeds on which the respondent or the creditor could make a claim. Danaharta had further agreed to waive the balance outstanding on the debt if the liquidators ceased pursuing them (on their behalf or on behalf of the creditor) on the issue of the disposal of the subject land. In all the affidavits filed by the creditor, there was nothing to show that the sale by Danaharta was fraudulent or at an under value. Danaharta was fully entitled to deal with the subject land as it deemed fit pursuant to s. 57(1) of the Danaharta Act. It is also trite law that Danaharta as a secured creditor can realise its security outside the liquidation process. The action by Danaharta had not prejudiced nor resulted

in any losses for the respondent. Any losses suffered would be suffered by Danaharta. Having realised the charged property, Danaharta is not in law, obliged to justify its actions to the creditor in the present circumstances of the case. Further, the information and documents produced by Danaharta in response to the queries of the liquidators and the creditor were amply sufficient to satisfy the queries raised by the creditor in relation to the dealings of the subject land by Danaharta. Accordingly, nothing could be obtained which would benefit the winding up of the respondent or its creditor by the examination of the applicant as ordered. (pp. 210 d, 211 a-e, 212 b-d & 213 a)

[6] The examination under s. 249 was made against the applicant, an officer of Danaharta, a third party to the winding up proceedings. He is not an officer or former officer of the wound up company and he owes no duty to the wound up company. In an otherwise proper case, he may be required to disclose documents or answer questions so as to provide the person who applied for it with the information necessary to carry out his functions even though this may have unfortunate repercussions for him but he owes no general duty to give such information and if by giving the information he risks exposing himself to liability, this involves an element of oppression. It should be borne in mind that the degree of possible oppression is greater in this case as compared to an officer or former officer of the wound up company. Although the section treats the production of documents and the oral examination of a person together, an order for oral examination is much more likely to be oppressive as it provides the opportunity for pre-trial depositions which the person who applied for it would not otherwise be entitled to. This greater risk of oppression when oral examination of a person is ordered calls for a more careful approach to such an order than to orders for the disclosure of documents. To compel the applicant or Danaharta to be examined and to produce documents relating to the sale of the subject land under such circumstances is very unfair and oppressive. (pp. 213 b-h & 214 d)

[7] The creditor has wholly failed to show by affidavit evidence that the sale of the subject land by Danaharta was fraudulent or at an undervalue or that Danaharta's actions had prejudiced the interests of the respondent or resulted in a loss to the respondent or its creditors. The private caveat entered over the subject land by the creditor was set aside by the court obviously because the court was not convinced that the basis for entry of the private caveat had any merit. Thus the probable motive for the creditor in applying for a s. 249 order was for the benefit of the creditor

alone be it to aid its appeal against the removal of the private caveat and its stay application or due to its frustration at not being able to purchase the subject land from Danaharta or all of the above. To allow the creditor to proceed with the proposed examination of the applicant under the circumstances of the case, is purely an abuse of court process. The above considerations clearly shows that the creditor's proposed examination of the applicant as an officer of Danaharta on the sale of the subject land to SJ Properties was oppressive, an exercise of harassment and served the interest of the creditor only. Such an exercise had no benefit to the respondent company's liquidation process. (pp. 214 f-h & 215 b)

Case(s) referred to:
Adlards Motor Group Holding Ltd [1990] BCLC 68 ***(refd)***
Cloverbay Ltd (Joint Administrators) v. Bank of Credit And Commerce International SA [1991] Ch 90 ***(refd)***
Director of Customs, Federal Territory v. Ler Cheng Chye liquidator of Castwell Sdn Bhd (in liquidation) [1995] 3 CLJ 316 SC ***(refd)***
In re North Australian Territory Company [1890] Ch 87 ***(refd)***
K Balasubramaniam, Liquidator bagi Kosmopolitan Kredit & Leasing Sdn Bhd (Dalam Likuidasi) v. MBF Finance Bhd & Anor [2005] 1 CLJ 793 CA ***(refd)***
Pegang Mining Co Ltd v. Choong Sam & Ors [1969] 2 MLJ 52 ***(refd)***
W & P Piling Pte Ltd v. Chew Yin What & Ors [2004] 3 SLR 164 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 249(1), (2), (3), (4), 277
Companies (Winding Up) Rules 1972, rr. 49, 50, 51
Pengurusan Danaharta Nasional Berhad Act 1988, s. 57(1)
Rules of the High Court 1980, O. 15 r. 6(2)(b)(ii)

Companies Act [Sing], s. 285
Companies (Winding Up) Rules [Sing], r. 49

For the applicant - TC Lim; M/s Shook Lin & Bok
For the creditor - HM Ooi (S Bhuvaneswary); Logan Sabapathy & Co

Reported by Sharmini Pillai

JUDGMENT

Ramly Ali J:
These grounds of judgment are in relation to the application by Pengurusan Danaharta National Bhd (Danaharta) *vide* encl. 33 and by Richard Kong Mun Choy (Richard Kong) an officer of Danaharta *vide* encl. 35, for *inter alia*:

1. leave to intervene in this action (by Danaharta); and

2. to set aside the *ex parte* order of 22 March 2005 allowing P & N Construction Sdn. Bhd., a creditor of the respondent company (the creditor), to examine Danaharta's officer, Richard Kong pursuant on s. 249 of the Companies Act 1965.

(For the purpose of these grounds of judgment, both Danaharta and Richard Kong shall be referred to as "the applicant").

Background To Encl. 33 And 35

Vide a Bridging Term Loan Agreement dated 23 December 1996 between Bank Utama (Malaysia) Bhd. (BUMB) and the respondent company, a Bridging Term Loan of RM61 million was granted by BUMB to the respondent company. A further sum of RM40 million as overdraft facility was granted by BUMB to the respondent company *vide* an overdraft facility agreement dated 6 March 1997 ("the said facilities"). On 7 January 1997 and 6 March 1997, first and second fixed charges over land held under lot 8111, PN 7336, Mukim Bukit Raja, Daerah Petaling Selangor Darul Ehsan (the subject land) were granted by the respondent company to BUMB as security for both the said facilities.

On 29 February 2000, a vesting certificate was issued in accordance with the Pengurusan Danaharta Nasional Bhd. Act 1998 (the Danaharta Act) whereby all rights, title and interest of BUMB, in and with respect to, the said facilities and the security documents in relation thereto were vested in Danaharta as of that date. On 13 March 2000 Danaharta wrote to the respondent company to notify it of Danaharta's acquisition of all BUMB's rights, title and interest relating to the said facilities.

On 22 July 2003, the respondent company was wound up and the official receiver appointed as provisional liquidator. A year later, on 17 August 2004, the current liquidators of the respondent company, Mak Kum Choon and Ng Meng Kwai (the liquidators) were appointed.

On 20 October 2003, Danaharta through its solicitors issued to the respondent company, a letter of demand, demanding from it payment of all sums due and owing to Danaharta in relation to the said facilities. The respondent company defaulted in repayment. On 30 October 2003, Danaharta through its solicitors, issued to the respondent company, a notice to sell the Subject Land by way of private treaty pursuant to the provisions of the Danaharta Act.

In December 2003, after the winding up of the respondent company, P & N Construction Sdn. Bhd. (the creditor), who at the material times was a creditor to the respondent company, through its holding company, Nam Fatt Corporation

Bhd. had written to Danaharta to indicate an interest in the subject land and offered to purchase the same for the sum of RM150 million. As at 15 October 2003, the market value of the subject land was valued at RM110 million.

On 17 May 2004, the creditor lodged its private caveat over the subject land.

On 24 May 2004 Danaharta's proof of debt of the respondent company was lodged. (As at 22 July 2003, the debt owed to Danaharta was RM175,314,276.98).

On 23 August 2004 Danaharta, pursuant to it's right as chargee, disposed of the subject land by way of a private treaty sale to S.J. Properties Sdn. Bhd. (SJ Properties) for RM135 million.

On 12 October 2004, after the subject land was sold to SJ Properties, the creditor wrote to inform the liquidators of the respondent company that the creditor wished to purchase the subject land "on terms no less favourable than previously expected by Danaharta".

This was communicated by the liquidators to Danaharta by a letter dated 14 October 2004. (About seven weeks after the subject land was sold to SJ Properties).

On 15 October 2004, SJ Properties, as the new owner of the Subject Land, filed an Originating Summons in Shah Alam High Court to remove the Creditor's private caveat over the Subject Land (which was lodged by the Creditor on 17 May 2004).

On 24 February 2005, Shah Alam High Court ordered the removal of the Creditor's private caveat over the Subject Land.

On 30 November 2004 the creditor wrote to the liquidators for information on the position surrounding the dealings with the subject land by Danaharta. The next day (1 December 2004) the creditor filed its *ex parte* Summon in Chambers (encl. 24) for an order to examine Danaharta's officer, one Richard Kong, on the dealing on with the subject land. (No such application has been made by the liquidators).

On 3 December 2004 Danaharta had written to the liquidators of the respondent company *inter alia*, to inform the liquidators that Danaharta was unable to accommodate their request for Danaharta to consider the creditor's offer to purchase the subject land as Danaharta had already exercised its rights and powers under the Danaharta Act and sold the subject land to SJ Properties, and to rebut the liquidators suggestion that the subject land was sold without the respondent company being first offered a chance to redeem the same.

After taking into account the realisation of the charged proceeds, the respondent company was indebted to Danaharta under the said facilities for the balance outstanding sum of RM64,523,050.36.

On 22 March 2005, an *ex parte* order was granted to the creditor, allowing the creditor to examine Richard Kong and ordering the production of documents in relation to dealings with the subject land.

On 25 March 205, Danaharta, through its solicitors, replied to the liquidators' letter dated 21 February 2005 to confirm:

(i) that the market value of the subject land was assessed to be RM110 million based on a valuation report on the subject land;

(ii) that the sale and the transfer of the subject land to SJ Properties had been concluded at RM135 million;

(iii) that the offer by the creditor to purchase the subject land was not accepted by Danaharta because the creditor's offer was bare of details and the completed sale of the subject land was on the basis that the purchaser would take the subject land on an "as is where is" basis notwithstanding the private caveats subsisting on the land with no obligation placed on Danaharta to remove the caveats;

(iv) that after setting off the sale proceeds of RM135 million against the debt due, as at 1 March 2005, the respondent company was still owing a balance debt of RM64,523,050.36 to Danaharta;

(v) that even if Danaharta were to accept the creditor's offer price of RM150 million (as suggested by the liquidators) for the subject land, there would still have been a shortfall of RM49,523,050.36 owing to Danaharta by the respondent company.

(vi) that Danaharta was prepared to waive the balance debt of RM64,523,050.36 against the respondent company if the liquidators ceased pursuing Danaharta, whether or not on behalf of the creditor, on the issue of the disposal of the subject land.

On 27 May 2005, both Danaharta and Richard Kong (the applicants) filed their respect applications (*vide* encls. 33 and 35) to set a side the *ex parte* order of 22 March 2005.

In essence Danaharta's application (*vide* encl. 33) prayers *inter alia* for the following orders, namely:

(1) that leave be given to the applicant to intervene in these proceedings;

(2) upon such leave being granted, that the applicant be made a party to the proceedings herein and the title of this action be amended to include the applicant as a respondent or as the court may direct, in these proceedings;

(3) that the *ex parte* order granted by this court on 22 March 2005 on the application of P & N Construction Sdn. Bhd. be discharged or set aside;

(4) that pending the disposal of the hearing of this application, the examination of the applicant's officer, Richard Kong Mun Choy and production of documents by the applicant's aforesaid officer pursuant to the said order of 22 March 2005 be stayed or adjourned to a date to be fixed;

(5) that the costs of this application be taxed and paid forthwith by P & N Construction Sdn. Bhd. to the applicant.

Vide encl. 35, Richard Kong prays the same orders as in prayer (3), (4) and (5) above.

The grounds for their applications are as follows:

(a) the said order of 22 March 2005 ought not to have been obtained on an *ex parte* basis;

(b) the said order obtained by the creditor, P & N Construction Sdn. Bhd. is an attempt to fish for information from Pengurusan Danaharta Nasional Berhad, the chargee of the land charged by the respondent company ("the subject land");

(c) the information sought by the creditor relating of the dealings with the subject land is not reasonably required and does not benefit the respondent company in any manner as there can be no recovery of assets or monies for the respondent company;

(d) the said creditor's application was an abuse of court process, particularly in view that the liquidators of the respondent company were still in the process of liaising with Pengurusan Danaharta Nasional Berhad on the matter.

Right Of Danaharta To Intervene

Danaharta's right to intervene in these proceedings cannot be disputed, as its officer, Richard Kong is being summoned to court to be examined by the creditor and its document are ones being required to be tendered to court pursuant to the said *ex parte* order of 22 March 2005. The transaction in question is about the sale of the subject land by Danaharta to SJ Properties.

Ultimately its rights and liabilities in respect of the subject matter of the proceedings (ie, the sale of the subject land) may directly be affected by the order or any subsequent order which may be made by the court (subsequent to the examination of Richard Kong by the creditor). Order 15 r. 6(2)(b)(ii) Rules of the High Court, clearly stipulates that at any stage of the proceedings in any cause or matter, the court may on such terms as it thinks just order to be added as a party, any person between whom and any party to the cause there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed the cause or matter which in the opinion of the court it would be just and convenient to determine.

The same principle was adopted by the Privy Council in *Pegang Mining Co. Ltd. v. Choong Sam & Ors* [1969] 2 MLJ 52 (at p. 56) where it was held by Lord Diplock that:

> A better way of expressing the test is: will his right against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

In the present situation, the court is fully satisfied that the rights and interest of Danaharta will be directly affected in the proceedings.

On that considerations the court allows prayer (1) and (2) of Danaharta application *vide* encl. 33.

Can *Ex parte* Order Be granted To The Creditor

By the said *ex parte* order of 22 March 2005, it was ordered that the creditor be at liberty to examine Richard Kong and that the said Richard Kong to produce all books, correspondence and/or documents in the custody of Danaharta or power relating to all the material circumstances surrounding the respondent company's land held under Lot 8111, PN 7336, Mukim Bukit Raya, Daerah Petaling Jaya Selangor Darul Ehsan. The said order was applied *ex parte* by the creditor and was granted *ex parte* on 22 March 2005.

The creditor contended that it was entitled to apply for such an *ex parte* order pursuant to s. 249 of the Companies Act 1965. The applicants on the other hand contended that such an order could not have been granted on an *ex parte* basis if the creditor (who applied for the order) was not one of the liquidators of the respondent company.

The relevant provisions cited by the creditor in its *ex parte* application for the said *ex parte* order of 22 March 2005 is s. 249 of the Companies Act 1965. Section 249(1)(2)(3)(4) of the Companies Act 1965 provides as follows:

249 Power to summon persons connected with company

(1) The court may summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the court deems capable of giving information concerning the promotion, formation, trade dealing, affairs or property of the company.

(2) The court may examine him on oath concerning the matters mentioned in sub-s. (1) either by word of mouth or on written interrogatories and may reduce his answers to writing and require him to sign them, and any writing so signed may be used in evidence in any legal proceedings against him.

(3) The court may require him to produce any books and papers in his custody or power relating to the company, but where he claims any *lien* on books or papers the production shall be without prejudice to that *lien*, and the Court shall have jurisdiction to determine all questions relating to that *lien*.

(4) An examination under this section or s. 250 may, if the court so directs and subject to the rules, be held before any (Sessions Court Judge) named for the purpose by the court, and the powers of the Court under this section and s. 250 may be exercised by such (Session Court Judge).

Subsection (4) of s. 249 clearly stipulates that an examination under the section is "subject to the rules" ie, the Companies (Winding Up) Rules 1972. Rule 49 of the Companies (Winding Up) Rules 1972 provides" "An application to the court to summon persons for examination under s. 249 may be made by the liquidator or any creditor or contributory. Such application shall, **if made by the liquidator**, be made *ex parte*, but if made by a creditor or contributory, be made by summons supported by an affidavit and the liquidator shall also be served.

Reading both s. 249, of the Companies Act 1965 together with r. 49 of the Companies (Winding Up) Rules 1972 clearly show that only he liquidator is entitled to apply *ex parte* under those provisions. The creditor or contributory may apply for such order but it must be by way of *inter partes* summons. The findings that the creditor's application cannot be made *ex parte* is fortified when r. 49 of the Companies (Winding Up) Rule 1972 is read together with rr. 50 and 51 (of the same Rules) where distinctions are made as to when a creditor in expressly entitled to make on *ex parte* application.

Under r. 50, "an application for an order for a public examination under s. 250 may be made ***ex parte* by the liquidator**". Under r. 51, "an application for on order for the examination of the liquidator or other persons under s. 277 may be made *ex parte* by the official receiver, the registrar of companies or **any creditor** or contributory and shall be supported by affidavit."

If a creditor or contributory were also allowed to apply *ex parte* under s. 249 of the Companies Act 1965, then r. 49 would have expressly stated so just as r. 51 does *vis-a-vis* s. 277 of the same Act. However, r. 49 does not expressly state that a creditor or contributory of a wound up company may make an *ex parte* application for an order under s. 249. In fact, r. 49 clearly provides that only a **liquidator** can make an *ex parte* application under s. 249. If a creditor wishes to make any application under s. 249, it must be by way of *inter partes* summons (supported by affidavits) and the necessary papers must be served on the liquidator as well other persons who may be affected by the order applied for (in this case, Danaharta and Richard Kong). In the present case, the creditor has failed to comply with the proper procedure in obtaining the *ex parte* order of 22 March 2005 (as laid down by s. 249 of the Companies Act 1965 reads together with r. 49 of the Companies (Winding UP) Rules 1972). Therefore the court is satisfied that the said *ex parte* order should not have been granted and therefore must be set aside.

The creditor's counsel claimed that the said application by the creditor was filed with the liquidators' confirmation that they do not object to the same. This submission is a statement from the Bar. The liquidators have not affirmed any affidavit to support the application. The creditor in this case is unsecured creditor to the respondent company. It is not a liquidator to the respondent company. The filing of the application in the present case, by the creditor cannot be any stretch of imagination be equated with an application by the liquidators themselves. Even if the liquidators did not object to the creditors' application (as claimed by the creditor's counsel), that does not mean that the creditor can be exempted from the procedural requirement as laid down by r. 49 of the Companies (Winding Up) Rules 1972. That being the case, the creditor cannot claim any right to apply *ex parte* for an order made s. 249.

The Singapore High Court in liquidator of *W & P Piling Pte Ltd v. Chew Yin What & Ors* [2004] 3 SLR 164 had caused to consider s. 285 of the Singapore Companies Act which is in *pari material* with our s. 249. In that case the court agreed that in normal course of events, applications for examination pursuant to s. 285 of the Singapore Companies Act ought not to be made *ex parte*, but through an *inter partes* summons pursuant to the provisions of r. 49 of the Singapore Companies (Winding Up) Rules (which is in *pari material* with our r. 49 of the Malaysian Companies (Winding Up) Rules 1972). It was also stressed in that case that the essential principle is that a party should in the normal course of events be heard before an order is made against him. The procedure should also, in any event, be prudently applied against third parties, given that it is a radical aberration departing from the usual mode of eleciting information.

The other grounds cited by the applicant to support their application *vide* encl. 33 and 35 are:

(i) the said *ex parte* order obtained by the creditor is oppressive and is an attempt to fish for information from Danaharta;

(ii) the information sought by the creditor relating to the dealings with the subject land is not reasonably required and does not benefit the respondent company in any manner as there can be no recovery of assets or monies for the respondent company.

(iii) the said creditor's application was an abuse of court process, particularly, in view that the liquidators of the respondent company were still in the process of liasing with Danaharta on the matter.

In order to fully appreciate those grounds cited by the applicants, it is pertinent at this point, to observe what are the principles governing application for examination under s. 249 of the Companies Act 1965.

Principles Governing Applications Under Section 249

Section 249 must be read together with r. 49, Companies (Winding Up) Rules 1972. The effect of these provisions is that they confer on the liquidator, creditor or contributory the extraordinary right to apply to court for leave to query persons on oath and to require him to produce any books and papers in his custody relating to wound up company. The persons to be queried may include officers of the company (being wound up) and any other persons (third parties) known or suspected to have in his possession any property of the company as well as any persons whom the court considers capable of giving information concerning the promotion, formation, trade dealings, affirms or property of the company. Rule 49 specifically provides that such application, **if made by the liquidator**, shall be made *ex parte* but if made by a creditor or contributory, shall be made by summons supported by an affidavit and the liquidator shall also be served. In other words, a unlike liquidator, creditor or contributory can only make such application by way of *inter partes* summons where the persons to be examined as well as the liquidator concerned must be served with the relevant papers.

This extraordinary power serves an essential and important purpose. If used correctly it generally but not invariably redresses disadvantages without creating advantages. However if used incorrectly, it could be draconian in it's application and crushing in its consequence. Unnecessary legal costs can also be incurred by all involved and scarce fund of the company may be severely depleted, (see: *Liquidator of W & P Piling Pte. Ltd. v. Chew in What & Ors.* [2004] 3 SLR 164). Our legal proceedings are generally required to be

conducted in the manner of an adverserial contest. The process of taking information or evidence on oath pursuant to these provisions, is an aberration which has been allowed into a fundamental tenet of an adversarial system. The court therefore plays an important and critical role in policing the exercise of these powers. In instances whether there is neither a reasonable basis for an investigation nor any real prospect of recouping loses or sustaining claims for the benefit of the company (being wound up) the court ought to be extremely cautious in allowing a proposed examination to proceed. The threshold test for information or documents is not one be of "absolute need" but that of a "reasonable requirement". The court must place on the scale of evaluation the purpose and the intent of an application on the one hand, and the oppression, inconvenience and disadvantage it may visit upon the proposed examinee one the other hand. In some instances, responses to the queries raised on oath or by way of an affidavit may be amply sufficient in place of an oral examination. If such relevant information can be procured without the exercise of this coercive power, it should not be invoked.

The essential questions to be addressed are:

(a) Is the procedure necessary for the business of preserving, collecting, managing or distributing the company's assets?;

(b) Is the applicant (liquidator, creditor or contributory) conducting himself reasonably in the circumstances?;

(c) Is it for the benefit of the company (being wound up)?;

(d) Is there any alternative process to obtain such information either by way of sworn affidavit or otherwise?.

(e) Is there any oppressive effect on the examinee?;

(f) Does the process amount to an abuse of process?.

In *Cloverbay Ltd (Joint Administrators) v. Bank of Credit And Commerce International SA* [1991] Ch 90, the Court of Appeal held that in exercising its discretion to order examination of a party, the court has to balance the requirements of the applicant against any possible oppression to the person to be examined. If the information required is so fundamental to any assessment of whether there is a cause of action against that party and the degree of oppression is small the order should be made but not otherwise.

It was also held in that case that the case for making an order against an officer or former officer of the wound up company will usually be stronger than it would be against a third party. Officers owe the company fiduciary

duties and a statutory obligation is imposed on them to assist the liquidator but no such considerations apply when an order is sought against a third party who owes no duty to the wound up company. It was also stressed in that case that an order for oral examination is much more likely to be oppressive than an order for the production of documents as it provides the opportunity for pre-trial dispositions, to incriminate the examinee which the liquidator or creditor or contributory would never otherwise entitled to.

The Court of Appeal in *In re North Australian Territory Company* [1890] Ch 87, held that the power to order an examination is an extraordinary power; it is a power of an inquisitorial kind which enables the court to direct to be examined some third party who is no party to a litigation.

In the present case, the court realises that there is no right for the creditor (as opposed to a liquidator) to obtain an *ex parte* order under s. 249 (especially when no evidence has been furnished as to why the order ought to be make *ex parte*). The court must consider balancing the draconion right to invoke the power to examine Richard Kong against the need to protect the proposed examinee (Richard Kong) and Danaharta from oppression and abuse of process. The need to protect a third party, in this case *Danaharta*, as represented by Richard Kong, is particularly acute, as the third party, unlike the officers of the respondent company, owe no duty to the company. The court has to particularly guard against the use of such oppressive power to order an examination (more oppressive if granted *ex parte*) if the purpose behind it is not for the benefit of the winding up of the respondent company, but for discovery or fishing of the matters which would be used for the creditor's benefit.

In instances where there is neither a reasonable basis for an investigation nor any real prospect of recouping losses or sustaining claims for the benefit of the wound up company, the court ought to be extremely cautious in allowing a proposed examination to proceed (see: *Adlards Motor Group Holding Ltd* [1990] BCLC 68).

The statutory process is not to be deployed as a tactical weapon to gain an undue strategic advantage in adversarial litigation. An undue delay in inquiring into relevant circumstances may also raise questions about the need for information or documents being sought. The proposed examinee can oppose or discharge an application for examination by showing:

(a) a case of oppression or unfair prejudice;

(b) that the information is not reasonably required;

(c) the liquidator is acting inappropriately outside his statutory functions or is motivated by improper considerations;

(d) that there has been a lack of full and frank disclosure by the liquidator; or

(e) that the examination is sought to give the company an undue tactical advantage.

Must Be For The Benefit Of The Respondent Company

The said *ex parte* order of 22 March 2005 allows the creditor to orally examine Richard Kong, a representative of Danaharta and for production of documents covering the sale of the Subject Land to S.J. Properties. The creditor alleged that it wanted to see that the respondent company's assets were properly and transparently dealt with for optimum recovery to the creditors of the respondent company.

An examination under s. 249 must be for the purpose benefit to the winding up of the respondent company. It must not be used for other collateral purposes that afforded no benefit to the respondent company. The court would have to be astute to ensure that the process is used for improper third party collateral interest or personal considerations of the creditors. For the court to order an examination under the said section, it is necessary to see that there is something that warrants being enquired into.

(see: (i) *Liquidators of W & P Piling Pte. Ltd. v. Chew Yin What* (*supra*)

(ii) *Re Adlards Motor Group Holding Ltd.* [1990] BCLC 68).

The information or evidence to be obtained must be able to assist in the winding up of the respondent company. In *In re Imperial Continental Water Corporation* (1886) Chancery Division, 314, it was held that the powers to examine were given for the more beneficial winding up of the company, and ought not to be used for the purpose of giving to the person who applied for it the benefit to enforce his own individual rights and which could not be for the benefit of the company

In the present case, the creditor has failed to show how the information sought by the creditor relating to the dealings with the subject land in reasonably required or assists the interest of the respondent company in liquidation. It is not disputed that Danahara is the only chargee to the subject land. It is also not disputed that Danaharta has obtained a valuation report showing that the

market value of the subject land at the material times was RM110 million. Danaharta has sold the subject land at RM135 million, higher than the market value. After setting off the sale proceeds of RM135 million against the debt due, as at 1 March 2005, the respondent company was still owing a balance debt of RM64,523,050.36 to Danaharta. Even if Danaharta were to accept the creditor's offer to purchase the subject land at RM150 million (as suggested by the creditor), there would still have been a short fall of RM49,523,050.36 owing to Danaharta by the respondent company. Either way, there would be no surplus sale proceeds on which the respondent company or its creditors can make a claim. Danaharta through its solicitor's letter dated 25 March 2005 to the liquidators has confirmed that it was prepared to waive the balance debt of RM64,523,050.36 against the respondent company if the liquidators ceased pursuing Danaharta, whether or not on behalf of the creditor, on the issue of the disposal of the subject land.

In all the affidavits filed by the creditor, there is nothing to show that the sale by Danaharta was fraudulent or at an under value. There is nothing unusual about the sale of the subject land by Danaharta to SJ. Properties. The sale price of RM135 million was clearly higher than the market price of RM110 million applicable at that material time. Danaharta was fully entitled to deal with the subject land as it deemed fit pursuant to the provisions of s. 57(1) of the Danaharta Act which provide *inter alia*, that notwithstanding any other law, Danaharta as chargee of the subject land is entitled to dispose the subject land by way of private treaty and to take all steps as it deemed fit to facilitate the disposal of the subject land by way of private treaty. It is also trite law that Danaharta, as a secured creditor, can realise its security outside the liquidation process:

(see: Federal Court decision in *K. Balasubramaniam, Liquidator bagi Kosmopolitan Kredit & Leasing Sdn. Bhd. (Dalam Likuidasi) v. MBF Finance Bhd. & Anor* [2005] 1 CLJ 793; and *Director of Customs, Federal Territory v. Ler Cheng Chye liquidator of Castwell Sdn. Bhd. (in liquidation)* [1995] 3 CLJ 316).

The subject land was sold to SJ Properties on 23 August 2004, almost two months before the liquidators wrote on 14 October 2004 to inform Danaharta of the creditor's desire to buy the subject land. The creditor only made a bare statement to the liquidators about the purposed offer to buy the subject land on 12 October 2004.

Prior to that (ie, on 18 December 2003) it was Nam Fatt Corporation Bhd. (not the creditor) a separate legal entity from the creditor had written to Danaharta to consider making an offer of RM150 million. There is nothing

wrong for Danaharta not to consider the offer made by Nam Fatt Corporation Bhd. at that point of time as Nam Fatt Corporation Bhd. was not a creditor nor a contributory to the respondent company.

The action of Danaharta had not prejudiced the interest of the respondent company or resulted in a loss to the respondent company. Any losses from not accepting the purported RM150 million offer would be suffered by Danaharta (As stated earlier, there would still be a shortfall of more than RM49.5 million due to Danaharta if the Subject Land is sold at RM150 million as alleged by the creditor). Thus, the creditor will not be in any better position as there will still be no surplus form the proceeds of the sale of the Subject Land.

Furthermore, the information and documents produced by Danaharta as response to the queries of both the liquidators and the creditor as disclosed in the applicants' 1st and 2nd affidavits are amply sufficient to satisfy the queries raised by the creditor in relation to the dealings of the subject land by Danaharta. Accordingly, nothing can be obtained which would benefit the winding up of the respondent company or its' creditors by the examination of Richard Kong as ordered.

In some instances responses to queries raised on oath or by way of an affidavit may be amply sufficient in place of an oral examination. If such relevant information can be procured without the exercise of this coeraine power, it should not be invoked. This principal was applied by the Singapore High Court in *Liquidator of W & P Piling Pte. Ltd. v. Chew Yin What (supra)*.

The creditor's attempt to examine Richard Kong as to the circumstances of the sale of the subject land to SJ Properties merely serves the interest of the creditor alone. The only interest the creditor can have is as an unsecured creditor of the respondent company. There is nothing which warrants Danaharta's officer to be examined, which would benefit the winding up of the respondent company. Danaharta had in fact informed the liquidator by letter dated 25 March 2005 that Danaharta was willing to waive the shortfall amount (standing at RM64,523,050.36) if the liquidators ceased to pursue the subject of the sale to SJ Properties. Danaharta was prepared to do this as it has already successfully realised its charges and did not wish to expend unnecessary time and effort to deal with the sale queries which were repeatedly made on behalf of the creditor. Such waiver would definitely be to the benefit of the respondent company's unsecured creditors. As a chargee of the subject land, Danaharta has sold the subject land above market value, and if there was a better offer, only Danaharta would suffer such loss, not the respondent company

nor its creditors. Having realised the changed property, Danaharta is not, in law, obliged to justify it's action to the company's creditors in the present circumstances of the case.

Oppressive Effect

The examination under s. 249 if not properly used, may be oppressive on the person to be examined. In exercising the discretion either to grant or not to grant any application under s. 249, the court has to balance the requirements of the person who applied for it against any possible oppression to the person to be examined. Such balancing depends on the relationship between the importance to the person who applied for it, of obtaining the information on the one hand and the degree of oppression to the person sought to be examined on the other. In the present case, the order for examination under s. 249 was made against Richard Kong, an officer of Danaharta, a third party to the winding up proceedings. He is not an officer or former officer of the wound up company. He owes no duty to the wound up company. In an otherwise proper case he may be required to disclose documents or answer questions so as to provide the person who applied for it with the information necessary to carry out his functions even though this may have unfortunate repercussions for him. But he owes no general duty to give such information and if by giving the information he risks exposing himself to liability this involves an element of oppression.

(see: *Cloverbay Ltd. v. BCCI Ltd.) (supra)*.

It should be borne in mind that the degree of possible oppression is greater in his case as compared to the officer or former officer of the wound up company.

Although the section treats the production of documents and the oral examination of a person together, an order for oral examination is much more likely to be oppressive than an order for the production of documents. An order for production of documents involves only advancing the time of discovery process if an action ensues, the person who applied for it is getting no more than any other litigant would get, save that he is getting it earlier. But oral examination provides the opportunity of pre-trial depositions which the person who applied for it would never otherwise be entitled to the person examined has to answer on oath and his answers can both provide evidence in support of a subsequent claim brought by the person who applied for it and also form the basis of later cross-examination. This greater risk of oppression when oral examination of a person is ordered calls for a more careful approach to such order than to orders for the disclosure of documents.

In the present case the *ex parte* order of 22 March 2005 granted to the creditor in effect allow the creditor to examine orally Richard Kong as well as ordering him to produce documents relating to the sale of the Subject Land by Danaharta to SJ Properties. As stated earlier, the examination of Richard Kong and production of the documents relating to the matter in question would not assist or beneficial to the winding up of the respondent company. At most, it is merely to serve the interest of the creditor as unsecured creditor to the respondent company. It has also been stated earlier that even if the creditor gets what he wanted, ie, to purchase the subject land at RM150 million, still it will not help the winding up of the respondent company because there would still be a shortfall of RM49,523,050.36 owing to Danaharta by the respondent company. Whatever shortfall that may exist, will not affect the interest of the respondent company as well as its unsecured creditors, because Danaharta had agreed to waive the shortfall.

To compel Richard Kong or Danaharta to be examined and to produce documents relating to the sale of the subject land under such circumstances is very unfair and oppressive. In this connection the court is in full agreement with Sir Nicholas Browne-Wilkinson VC in *Cloverbay Ltd v. BCCI Ltd.* (*supra*) when his Lordship ruled:

> In my judgment, to order pre-trial depositions from parties suspected of fraud or dishonest behaviour is very oppressive. The courts have always been astute to protect the interests of those accused of fraud in the civil courts and to require the plaintiff to prove his case against them. To use s. 236 of the Insolvency Act 1986 so as to run contrary to that attitude is, in my judgment, oppressive.

In the present case, the creditor has wholly failed to show in its affidavits that the sale of the subject land by Danaharta was fraudulent or at an undervalue or that Danaharta's actions have prejudiced the interests of the respondent company or resulted in a loss to the respondent company or its creditors. It is noted that the private caveat entered by the creditor over the subject land was set aside by the Shah Alam High Court on 24 February 2005. The court was obviously not convinced that the basis for entry of the caveat ie, that the creditor had a right to a charge over the subject land, has any merit. Thus, what is the real motive of the creditor in applying for the present application under s. 249 against Richard Kong? The probable answer is that the application was made for the benefit of the creditor alone, be it to aid its appeal against the removal of its caveat and its stay application or due to its frustration at not being able to purchase the subject land from Danaharta or all the above. To allow the creditor to proceed with the proposed examination of Richard Kong under the circumstances of this case is purely an abuse of the court process. In this context the court is in full agreement with the decision of Bowen L.J. in *In re North Australian Territory Company* (*supra*) where

the Court of Appeal held that it is an abuse and an oppression to force a third party to answer questions simply as an attempt to get discovery of matters on a possible legal action. This would not be with the intention of assisting the winding up of the wound up company.

Conclusion

The above considerations clearly show that the creditor's proposed examination of Richard Kong as an officer of Danaharta on the circumstances of the sale of the subject land to SJ Properties is oppressive, an exercise of harassment and serves the interest of the creditor only. Such exercise has no benefit to the respondent company's liquidation process. It is also an abuse of the court's process and the *ex parte* order granted to the creditor on 22 March 2005 should be set aside.

Based on the above grounds, the court allow the application of Danaharta and Richard Kong (*vide* encls. 33 and 35) with costs.